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July 29, 1998

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Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


Re: WT Docket No. 94-147

Dear Ms. Salas:

Transmitted herewith is an original and six (6) copies of the Trial Brief of James A. Kay, Jr.

Should the Commission have any questions with respect to this filing, please communicate with the undersigned.

Sincerely yours,



Aaron P. Shainis
Counsel for
JAMES A. KAY, JR.

Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUL 29 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)

JAMES A. KAY, JR.)

WT Docket No. 94-147

Licensee of one hundred fifty two Part 90)
licenses in the Los Angeles, California area)

To: Administrative Law Judge Richard Sippel

TRIAL BRIEF OF JAMES A. KAY, JR.

James A. Kay, Jr. ("Kay"), by his attorneys, hereby submits his trial brief in the above-captioned proceeding, in accordance with the Presiding Judge's *Order* (FCC 98M-40; released April 2, 1998).

Objection and Conditional Submission. For the reasons stated in the currently pending *Motion to Recuse Presiding Judge*, in particular pages 5-6, Kay objects to being required to provide much of the information called for by the Presiding Judge in this Trial Brief prior to the Bureau having satisfied its burden of proceeding pursuant to Section 312(d) of the Communications Act of 1934, as amended., 47 U.S.C. § 312(d).¹ Kay believes the requirement that he file a trial brief with the specific elements dictated by the Presiding Judge effectively imposes a burden of proceeding on Kay in direct contravention of Section 312(d). Accordingly,

¹ Both the Presiding Judge and the Bureau have suggested that Kay's Section 312 objections do not lie because Kay's former counsel agreed to the April 2, 1998, *Order*. But counsel merely agreed to a schedule, *i.e.*, dates for various events. There was no agreement as to substantive issues and certainly no waiver of procedural rights conferred by statute. Kay has thus far complied with the requirements of the April 2 *Order*. He exchanged hearing exhibits on the appointed day, and he is now submitting this trial brief. Kay's objection is not to the requirement that he submit a trial brief, but rather to the specific content of the brief prescribed by the Presiding Judge insofar as it is inconsistent with Section 312(d) of the Communications Act.

this Trial Brief is being submitted only subject to this objection and without conceding or waiving Kay's position with respect to the burden of proceeding.

A. Summary of the Case

Kay is unable to provide a summary of his case at this time. Kay has neither the burden of proceeding nor the burden of proof as to any of the designated or added issues in this proceeding. Both the burden of proceeding and the burden of proof on all issues rests with the Bureau. Accordingly, Kay does not intend to introduce any evidence nor present any witnesses until such time as the Bureau has presented its case and has rested. Whether Kay will present a case in chief, and what that case will be, necessarily depends on the nature and substance of the Bureau's case in chief. If the Bureau fails to make a prima facie showing, Kay may decide not to present a case in chief of his own.

B. Summary of Testimony and Exhibits

On June 29, 1998, Kay exchanged with the Bureau his potential direct case exhibits and a list of potential witnesses. Kay had previously exchanged with the Bureau a description of witnesses and a brief summary of their anticipated testimony. For the reasons stated in Section A of this Trial Brief, both the direct case exhibits and the list of witnesses are preliminary, although they do represent Kay's best good faith estimate based on the information currently available to him. Kay will be unable to provide a definitive witness list or a more detailed description of exhibits and testimony until such time as the Bureau has satisfied its burden of proceeding. To this end, while Kay will, through counsel, appear at and participate in any pre-trial admissions session, Kay does not intend to move any exhibits into evidence at that time.

C. Identity of Witnesses Sponsoring and Explaining Technical Documents

To the extent Kay is able to determine this information at this time, it has been included in the preliminary direct case exhibits exchanged on June 29, 1998.

D. Sanctions Sought by the Bureau

This information is to be supplied by the Bureau, not by Kay.

E. Stipulations

Insofar as Kay is not presenting a case until conclusion of the Bureau's case, *see* Section A of this Trial Brief, above, Kay has no stipulations to offer at this time. The Bureau has thus far not presented any proposed stipulations for consideration by Kay. If the Bureau presents proposed stipulations, as part of its trial brief or otherwise, Kay will give them due consideration.

F. Glossary of Technical Terms

Subject to the caveat expressed in Section A of this Trial Brief, Kay does not anticipate that his direct case, if presented, will involve the use of any unusually complex or unfamiliar technical terms that can not be adequately explained by the witness at the time such term is used in testimony.

G. Legal Points and Authorities

As for his determination not to present evidence prior to the conclusion of the Bureau's case in chief, Kay relies principally on Section 312(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(d), and paragraph 74 of *Algreg Cellular Engineering*, 9 FCC Rcd 5098, 75 RR 2d 1956 (Rev. Bd. 1994).

With regard to the allegations that Kay violated Section 308(b) of the Communications Act and various different Commission regulations, Kay will, of course, rely on the applicable statutory provisions and regulations themselves. Additional legal authorities to be relied upon by

Kay will depend on the nature and scope of the Bureau's showing, if any, under each of the designated or added issues.

As to the added issues charging Kay with misrepresentation and lack of candor, the legal authorities to be principally relied upon by Kay will include, but are not limited to, the following: *Lutheran Church-Missouri Synod v. FCC*, No. 97-1116, slip. op. at 24 (D.C. Cir. Apr. 14, 1998); *Fox River Broadcasting, Inc.*, 93 FCC2d 127, 129, (1983); *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995). If permitted to offer argument as to the added transfer of control issue, the legal authorities to be principally relied upon by Kay will include, but are not limited to, the following: *Motorola, Inc. (Order, issued 30 July 1985, File Nos. 50705 et al.)*; *Intermountain Microwave*, 24 RR 983 (1963); *Ellis Thompson*, 3 FCC Rcd 3962 (Mob. Serv. Div. 1988), *affirmed on recon.*, 4 FCC Rcd 2599 (Com. Car. Bur. 1989), *affirmed on review sub nom. Ellis Thompson Corp.*, 7 FCC Rcd 3932 (1992), *reversed on other grounds sub nom. Telephone and Data Systems, Inc. v. FCC*, 19 F3d 42 (D.C. Cir. 1994); and *Ellis Thompson Corp., Summary Decision of Administrative Law Judge Joseph Chachkin ("ETC Summary Decision")*, 10 FCC Rcd 12554 (1995).

Kay may also rely generally on the *Character Qualifications Policy Statement*, 102 FCC 2d 1179 (1986) and the *Forfeiture Policy Statement*, 12 FCC Rcd 17087 (1997).

H. Expert Witness Testimony

1. Kay's Expert Witnesses

For the reasons stated in Section A of this Trial Brief, Kay is unable at this time to present a definitive summary of the anticipated expert testimony to be offered on his behalf. Notwithstanding this caveat, Kay hereby advises that it is likely he will offer the expert testimony of John Bryant and James Hanno. The identity, qualifications, and likely areas of

testimony of both gentlemen are already known to the Bureau; indeed, the Bureau has deposed both witnesses. Their testimony will focus primarily on the record keeping aspects of Kay's dispatch operations, including, but not necessarily limited to, the inability of Kay's record keeping system to facilitate the reproduction of historical channel-by-channel loading information. Both witnesses will testify that Kay's operations and record keeping methods are typical of SMR systems of Kay's nature, scope, and size. Mr. Bryant will testify principally as to the SMR industry in the Los Angeles, California, area, and Mr. Hanno will testify principally as to the SMR industry nationwide.

2. The Bureau's Expert Witness

The Bureau has identified Mr. William T. Gerrard as its only proposed expert witness. Insofar as Mr. Gerrard has not yet testified, it is impossible for Kay at this time to present a comprehensive itemization of possible objections. Nevertheless, Kay will not stipulate to the qualifications of Mr. Gerrard as an expert witness in this case, and at the admissions session, or at such other time as may be appropriate, Kay anticipates objecting to the presentation of Mr. Gerrard as an expert witness in this proceeding. The grounds for such objection will include, but will not necessarily be limited to, the following:

(a) Lack of Expertise

The Bureau is offering Mr. Gerrard as an expert on the SMR industry in support of its contention that Kay's SMR operations failed to comply with various FCC regulations. The regulatory requirements for conventional SMR systems, however, are significantly different in most applicable respects from the regulatory requirements for trunked SMR systems. Mr. Kay's systems are conventional systems. To the extent Mr. Kay operates trunked systems, they are systems that were originally licensed as conventional systems and later converted to trunked


systems. Mr. Gerrard's industry experience, on the other hand, is almost exclusively limited to trunked systems initially licensed as such. Indeed, Mr. Gerrard admitted at his deposition that he had no familiarity with the Commission's policies, requirements, or regulations pertaining specifically to conventional systems. Accordingly, he lacks sufficient expertise to be used as an expert witness as to the compliance of Kay's operations with FCC requirements.

(b) Inadequate Opportunity for Discovery

At the time of his deposition, Mr. Gerrard had made no inspection, review, analysis, study, etc., of Kay's system, operation, or practices. He had made only a cursory review of a very small representative sampling of the business records supplied by Kay to the Bureau. As such, he had no knowledge of and, naturally, no opinion as to the conformance of Kay's operations to industry custom and practice or FCC regulatory requirements. Kay will therefore object to any attempt to introduce testimony from Mr. Gerrard as to these matters on the grounds that Kay was precluded from meaningful discovery.

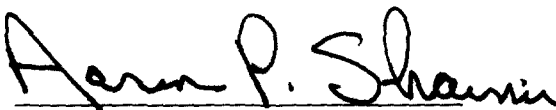
Respectfully submitted this 29th day of July, 1998

JAMES A. KAY, JR.

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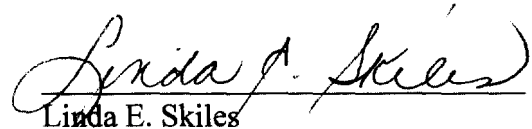
CERTIFICATE OF SERVICE

I, Linda E. Skiles, Office Administrator, in the law firm of Shainis & Peltzman, Chartered, do hereby certify that on this 29th day of July, 1998, copies of the foregoing document were sent, via hand delivery to the following:

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